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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-1375

THE CALIFORNIA HIGHWAY COMMISSION, *et al.*,
Petitioners,

vs.

LA RAZA UNIDA OF SOUTHERN ALAMEDA COUNTY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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The California Highway Commission and the other state officers, employees and agencies named as defendants in the district court pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit entered on November 29, 1973.

OPINIONS BELOW

The order of the court of appeals of which review is sought is not yet reported. It is set forth in Appendix A of this petition.

The memorandum and order of District Court for the Northern District of California is reported at 337 F.Supp. 221, at 3 ERC 1306, and is set forth in Appendix B of this petition.

The order of this Court denying a petition for a writ of certiorari before judgment is reported at ..... U.S. ....., 93 S.Ct. 105.

JURISDICTION

The order of the Court of Appeals for the Ninth Circuit was entered on November 29, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Does the statutory scheme of the Federal-Aid Highway Act require that all applicable federal statutory and regulatory standards and procedures be met for all highway projects located on federal-aid routes whether any federal funds are sought or received for such projects?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth in Appendix C hereof. They include the following:

(1) Section 103 of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 103.

(2) Section 105 of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 105.

(3) Section 106 of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 106.

(4) Section 138 of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138. The same language appearing as Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f).

STATEMENT OF THE CASE

This is a class action for declaratory and injunctive relief brought against state and federal highway officials challenging and seeking to halt planning and property acquisition activities of the State in connection with a freeway project. The jurisdiction of the district court was invoked because of questions relating to the duties of state and federal officials under federal statutes.

The subject of the action is a fourteen mile long freeway, State Route 238, which the State of California proposes to construct in Alameda County. Following public hearings, the route of the freeway was adopted by the California Highway Commission on June 1, 1961. Thereafter, beginning in 1965, a series of public hearings were held in the area affected by the proposed freeway at which the major design fea-

tures of the project were proposed and discussed. As a result of these meetings several Freeway Agreements were entered into between the State and local governments along the route.

A strip map of the adopted route was submitted to federal officials, and "location approval" as a federal-aid primary route was accorded on November 4, 1966. This approval was evidenced by a federal official's signature on the map.

In 1968, there was a possibility that Route 238 might be accepted into the Interstate System of highways. The State applied for and, on November 21, 1968, received "Stage 1 Program Approval for Preliminary Engineering". The approval was accompanied by a specific disavowal that any obligation to provide federal funds was created thereby. The portent of this approval was that, should the route be accepted into the Interstate System and eventually qualify for and receive approval of Plans, Specifications and Estimates pursuant to 23 U.S.C. § 106, the State could seek pro rata reimbursement for the cost of preliminary engineering incurred after the date of Stage 1 approval. In the normal processing of an Interstate project, Stage 1 approval is sought at the time of, or prior to, location approval. Stage 1 program approval is not sought for federal-aid primary routes because the federal government does not participate in development costs for projects in that system. For routes in the federal-aid primary system, only Stage 2 Program Approval for Construction Costs is sought, and this is done shortly before application for Plans, Spe-

cifications & Estimates Approval is made. The two-stage program approval is an administrative device set up for Interstate projects. With respect to projects other than Interstate, Program Approval for Construction Costs is that which is contemplated by 23 U.S.C. § 105.

The State sought Stage 1 Program Approval for Route 238 only because there was a possibility that it would become an Interstate route. That eventuality did not occur, and Route 238 remained in the Federal-Aid Primary System.

No further federal approvals have ever been sought for Route 238. No federal funds have ever been received by the State of California for any activity connected with Route 238. All right of way acquisition, relocation payments, design work, administrative costs and other expenses have been borne solely by the State. At the time this action was filed, approximately $15,232,000.00 in State funds had been spent on right-of-way acquisition and $326,248.00 had been spent for relocation assistance payments. The federal government is not legally or otherwise obligated to pay or reimburse any of the cost of any activity connected with Route 238 unless and until the State applies for and the federal government grants approval of plans, specifications and estimates pursuant to 23 U.S.C. § 106(a).

On June 16, 1971, the complaint herein was filed. Plaintiffs, several Mexican-American organizations, the Sierra Club, and a number of individuals residing in the area of the project, alleged violations of their

rights under various federal statutes, most notably the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646; 84 Stat. 1894), the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 et seq.), Section 4(f) of the Department of Transportation Act of 1966 (49 U.S.C. § 1653(f)), and substantially identical provisions of the Federal-Aid Highway Act of 1968 (23 U.S.C. § 138).

On November 9, 1971, the district court issued its Preliminary Injunction enjoining the State from acquiring any further real property for the Route 238 project, from removing or contacting any resident of premises on or near the route and from "undertaking any other actions whatsoever in connection with the... project that would materially affect the environment." The order provides that the injunction may be lifted upon a showing of full and reasonable compliance with federal relocation and parkland acquisition procedures.

The point of law upon which the injunction rests was stated by the district court in these words:

> "The court believes that for the purpose of applying the various federal statutes and regulations a federal-aid highway is any project for which the state has obtained location approval. The state should not have the considerable benefits that accompany an option to obtain federal funds without also assuming the attendant obligations. Any project that seeks even the possible protection and assistance of the federal government must fall within the statutes and regulations." (337 F.Supp. at 227)

In an appeal addressed solely and directly to the question of when a highway project becomes a "federal project" requiring the mandatory application of federal standards and procedures, the Court of Appeals affirmed the District Court's order. In doing so, the Court of Appeals relied upon an inaccurate and misleading recital of the sequence of federal approvals for highway projects and failed to make any distinction between the procedures applicable to Interstate projects and federal-aid primary projects. The Court held that the purpose of the various federal statutes at issue is to assure that projects for which federal funds *might* become available are developed in compliance with federal standards.

In sum, the lower courts have held that full compliance with all federal statutes and regulations is required, and subject to the mandate of a federal court, for all highway projects located on federal-aid routes whether any federal funds are ever sought or obtained for such projects.

REASONS FOR GRANTING THE WRIT

THE QUESTION PRESENTED BY THIS CASE HAS A DIRECT EFFECT UPON A GREAT NUMBER OF HIGHWAY PROJECTS THROUGHOUT THE NATION AND THE RULINGS OF THE LOWER COURTS HEREIN ARE IN DIRECT CONFLICT WITH THE INTENT OF CONGRESS AND RULINGS OF THIS COURT.

In California 83% of all highways are in federal-aid systems. Historically, the State has sought location approval from federal officials for all projects located on any federal-aid route. This procedure is undoubtedly followed in many other states. The great majority of these projects will never receive any federal funds; many will receive no further federal approval beyond location approval. Under the ruling of the District Court and the Court of Appeals in this case, all of those projects must now be fully recycled to comply with all federal statutes and regulations regardless of the stage of development the projects may now be in, whether or not any federal funds will be used in completing the project. In many instances this will require useless rewriting of paper work for submission to federal authorities without affording substantially more protection to the people or the environment affected by the projects than is already provided under state statutes and procedures.

The rulings of the courts below are clearly in direct opposition to the intent of Congress in enacting the Federal-Aid Highway Act and related statutes. A reading of the statutes as a whole clearly establishes an intent to create a conditional grant-in-aid program whereby Congress, by offering federal funds,

seeks to induce state agencies to meet certain standards in the development of various classes of highways. There is nothing in any of the statutes which suggests an intent to make all highway construction subject to federal control.

In setting forth the various standards and procedures, language such as "the Secretary shall not approve" and "federal funds shall not be expended" has been repeatedly used by Congress. The language of the statutes firmly buttressed by the legislative history of the Act, clearly establishes that only with federal funds comes federal control; the standards and procedures are conditions upon the receipt of those funds.

The federal relocation standards, invoked by the courts below, are, similarly, conditions upon the receipt of funds. Section 210 of the Uniform Act provides that:

> "Notwithstanding any other law, *the head of a Federal agency shall not approve any grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project* which will result in the displacement of any person on or after January 2, 1971, unless he receives satisfactory assurances . . ." 42 U.S.C. § 4630 [Emphasis added]

This language obviously does not make a direct command to the States, but imposes a condition upon the receipt of funds under various federal grant-in-aid programs.

The language of the federal statutes protecting parklands from use for highway projects evidences a similar intent. In *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971), this Court stated:

> "These statutes [23 U.S.C. § 138 and 49 U.S.C. § 1653(f)] prohibit the Secretary of Transportation from *authorizing the use of federal funds* to finance the construction of highways through public parks if a 'feasible and prudent' alternative route exists." 401 U.S. at 405. [Emphasis added.]

At another point in that opinion, the Court said:

> "This language is a plain and explicit *bar to the use of federal funds* for construction of highways through parks. . . ." Id. at 411. [Emphasis added.]

Justices Black and Brennan, in their separate opinion, characterized the statutes as imposing a duty on the Secretary ". . . not to permit a *federally financed* public highway to run through a public park. . . ." (Id. at 421 [Emphasis added.]).

In other cases, this Court has recognized that, where Congress does not purport to act under the Supremacy Clause, the standards and requirements set forth in federal legislation constitute conditions upon the receipt of funds. *James v. Valtierra,* 402 U.S. 137 (1971); *State of Oklahoma v. United States Civil Service Commission,* 330 U.S. 127 (1947).

The District Court and the Court of Appeals rejected the evidence of the legislative scheme, the language of the statutes and the careful language of this

Court, and held that the federal standards and procedures are mandatorily applicable to any highway project for which location approval has been received.

By almost wholly misstating the stages and timing of the various federal approvals under the program, the Court of Appeals has compounded the confusion created by the holding. (See F. Anderson, *NEPA in the Courts—A Legal Analysis of the National Environmental Policy Act,* pp. 160-161 (1973); R. Peterson and R. Kennan, The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretation, 2 ELR 50001 (April 1972).

At this stage, only this Court can settle this point which is fundamental to the federal highway program and the relationship of the states to that program. Only this Court can reestablish the intent of Congress as evidenced by the legislative history and the language of the statutes.

This case presents an extremely important question of federal-state relations and of the meaning and application of a vital federal statutory scheme. It is a question so basic to an important and active field of litigation that it should properly command the attention of this Court.

It is, therefore, submitted that a hearing by this Court in this case would serve the best interests of state and federal highway administrators, persons interested in assuring that necessary highway facilities

are planned and constructed at the least possible human, environmental and financial cost, and of the public at large.

Dated, San Francisco, California,
March 7, 1974.

Respectfully submitted,
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(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

La Raza Unida of Southern Alameda County, etc., et al., Appellee, vs. John Volpe, Secty. Transportation, etc., et al., Appellant.	No. 72-1059 No. 72-1111 OPINION

[November 29, 1973]

Before: CHAMBERS, HUFSTEDLER and SNEED, Circuit Judges.

SNEED, Circuit Judge:

This is an appeal from an order granting the plaintiffs' motions for a preliminary injunction restraining the defendants including the California Highway Commission, from proceeding with State Project 238, a proposed highway of 14 miles that will pass through three California cities, Hayward, Union City, and Fremont. The purpose of the injunction is to secure compliance by the California Highway Commission with 42 U.S.C. §4622-4655, Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs; 23 U.S.C. §502(3),[1] Federal-Aid Highway Act of 1968; 49 U.S.C.

[1]Repealed by Pub. L. No. 91-646, Title II, §220(a)(10), 84 Stat. 1903.

§1653(f) of the Department of Transportation Act of 1966; 23 U.S.C. §138, Federal-Aid Highway Act of 1968; and all Federal regulations promulgated under each of these provisions.[2]

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[2]The preliminary injunction which is the subject of this appeal provides in full:

1. It is hereby ordered, adjudged, and decreed, that pending the further Order of the Court, state defendants, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them or any of them are, each and all, hereby restrained and enjoined from:

(a) Acquiring any further real property in the Cities of Hayward, Union City, and Fremont, California, for right-of-way for the Route 238 Project; and

(b) Attempting to remove, threatening to remove, or acting to remove (by initiating contacts or making solicited or unsolicited offers or otherwise) any resident of premises located on or near proposed right-of-way for the Route 238 Project; and

(c) Undertaking any other actions whatsoever in connection with the Route 238 Project that would materially affect the environment.

2. It is further hereby ordered, adjudged and decreed, that commencing immediately, and thereafter until the further order of this Court, defendant Volpe, his officers, agents, servants, employees, attorneys, and all persons in active concert with them or any of them, each and all, are hereby restrained and enjoined from continuing to accord or to accord any approval to the Route 238 Project or plans, maps, or other documents connected therewith.

3. It is further hereby ordered, adjudged and decreed, that no person restrained and enjoined by this Preliminary Injunction shall undertake to avoid compliance by any indirection.

4. Any person enjoined by this Preliminary Injunction may move for termination upon showing that Federal and State defendants have fully and reasonably complied with Sections 205 and 210 of the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970, P.L. 91-646, 84 Stat. 1894; Section 502(3) of the Federal-Aid Highway Act of 1968, 23 U.S.C. §502(3); Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. §1653(f); Section 138 of the Federal-Aid Highway Act of 1968, 23 U.S.C. §138; and all Federal Regulations promulgated under each of said statutes.

La Raza Unida v. Volpe, 337 F.Supp. 221, 234 (N.D.Cal. 1971).

The Commission's position on this appeal is that these provisions are applicable only in the sense that compliance is necessary in order to obtain federal funding. Under this interpretation the Commission would have an option to obtain federal funding by complying with these provisions. Failure to comply merely would deprive the State of federal funds. The determination whether the condition precedent to federal funding had occurred would be appropriate only at the final state of the approval process outlined in 23 U.S.C. §106(a), the so-called "construction approval."[3] As a consequence, the Commission argues,

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[3]The Federal-Aid Highway Act, 23 U.S.C. §101 *et seq.*, establishes a federal grant-in-aid program whereby the federal government, through the Federal Highway Commission, [FHWA], will assist in funding the construction of highways on the interstate, primary and urban systems of federal-aid highways provided that the State complies with the standards set forth in the Act. The program is administered through the FHWA's approval of "projects" submitted by the states to obtain federal reimbursement; and funding is ultimately dependent upon the successful completion of a series of successive stages at which FHWA reviews and approves the plans for each project which has been submitted.

Two of the approvals upon which funding depend are statutorily mandated. These are known as "program approval", 23 U.S.C. §105(a), and "approval of plans, specifications and estimates" or "P S & E approval", 23 U.S.C. §106(a). Program approval, which is to occur "as soon as practical after the apportionments for the Federal-aid systems have been made for any fiscal year", 23 U.S.C. §105(a), and which is necessary to enable the State to receive any reimbursement for a project, does not impose on the federal government a contractual obligation to pay its share of the project's cost. It is not until there has been "P S & E" approval, which is normally deferred until the state is actually ready to receive reimbursement funds, that any binding obligation arises. 23 U.S.C. §106(a).

In conjunction with the required statutory approvals, there are three additional approvals which are mandated by the applicable administrative regulations. Under 23 U.S.C. §128(a), the state highway department must certify that it has given formal consideration to "the social, economic, environmental, and other

it would have been appropriate for the District Court to have entered a declaratory judgment that the statutes here involved were applicable if federal funds are to become available and to have enjoined the Federal Government from making funds available to the project "until and unless the requirements are met and approved by the Court." (Appellant's Reply Brief, p. 5.) Under no circumstances should a state be *enjoined* to comply. The carrot of federal funding, not the stick of an injunction, insists the Com-

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effects" of a proposed route and its alternative possibilities. In order to meet this requirement, where the proposed highway is to pass through a city FHWA regulations require the State to hold a public hearing—called the "corridor hearing"—on the location of the route. Assuming that the State has held such a hearing, and fully complied with all other "applicable laws and regulations", Policy and Procedure Memorandum (PPM) 20-8 (January 14, 1969), then "location approval" is accorded the project. The State must then hold a second hearing—called the "design hearing"—concerning the proposed engineering design for the project. Again, the State must demonstrate compliance with all federal laws and regulations before "design approval" is given. Both location approval and design approval follow program approval of the project, but must occur before P S & E approval is given under Section 106.

At some point, prior to P S & E approval, the State is required, *inter alia*, to give "satisfactory assurances" that it can provide prospective displacees with adequate relocation housing and payments. 23 U.S.C. §502. *See also* Information Memorandum 80-1-68. In addition, it must also prepare and submit an environmental impact statement as required by the National Environmental Policy Act of 1969, 42 U.S.C. §4321 *et seq.* *See Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971). If these requirements are met, together with all other applicable laws and regulations, then P S & E approval is given under 23 U.S.C. §106 and the federal government becomes bound to contribute to the project.

Generally P S & E approval leads to right-of-way acquisition and preparation for construction. Assuming that no problems arise, the final FHWA approval, known as "authorization to proceed with work approval", PPM 21-1 (April 15, 1950), is then received and actual construction of the project begins.

mission, is the only compulsion authorized by the applicable statutory and regulatory scheme.

We do not agree with the Commission's interpretation of these provisions. The general purpose of these statutes and regulations is to assure that projects for which federal funding might become available are carried out in a way that will afford the protection both to those displaced that 42 U.S.C. §4622-4655 provides and to the environment, including public parks, that is commanded by 49 U.S.C. §1653(f) and 23 U.S.C. §138. The effectuation of this purpose makes necessary both the carrot and the stick. Without the stick there will be fewer instances in which compliance with these provisions will be achieved. This is true because the Commission under its interpretation would be able to secure the program approval contemplated by 23 U.S.C. §105 for a greater number of projects than could be funded by the sums apportioned and made available pursuant to 23 U.S.C. §104 and §106(a) and to qualify for actual funding only those projects with respect to which compliance proved to be relatively easy and inexpensive.

We believe that Judge Peckham correctly interpreted the applicable statutes and regulations to require compliance by the Commission with those provisions providing relocation assistance and protecting the environment "before location approval, [and] prior to federal funding of a project." *La Raza Unida v. Volpe,* 337 F.Supp. 221, 231 (N.D. Calif. 1971). Moreover, it is our view that it is much too late for the State to avoid compliance by withdraw-

ing State Project 238 from the Federal-aid system described in 23 U.S.C. §103. Whether a withdrawal for this purpose would be effective if attempted subsequent to the program approval of 23 U.S.C. §105 but prior to obtaining the location approval, which is required by Policy and Procedure Memorandum, 20-8, Bureau of Public Roads, U.S. Department of Transportation (1969), is not before us. For present purposes it is enough to observe that such withdrawal must be clear and unambiguous and prior to causing significant harm either to those who might be displaced by the project or to the environment in a manner inconsistent with the intent of 49 U.S.C. §1653(f) and 23 U.S.C. §138.

Under the facts of the case before us, we see no reason to disturb the preliminary injunction ordered by the District Court. It is consistent with the position taken by this Circuit in *Lathan v. Volpe,* 455 F.2d 1111 (9th Cir. 1971).

Affirmed.

Appendix B

In the United States District Court
Northern District of California

No. C-71 1166 RFP

La Raza Unida, et al.,	*Plaintiffs,*
vs.	
Volpe, et al.,	*Defendants.*

MEMORANDUM AND ORDER

I. FACTS

This is a class action complaint for declaratory and injunctive relief in regard to State Project 238, a proposed highway of 14 miles that will pass through Hayward, Union City, and Fremont.

The system of roads involved here is the federal-aid primary highway system. (There are four federal-aid systems, the other three being interstate, urban, and secondary.) California normally receives approximately fifty million dollars per year for work on the primary system; this money is available on a 50-50, State-federal sharing basis.

Pursuant to 23 U.S.C. § 103 federal approval at various stages of highway design and construction is required before the state can receive federal funds.

First the state must approve a vague corridor for the highway; this step is called *systems approval. Location approval* is the second step in project development; at that time the route within the previously defined corridor is established. Federal approval is required here.

Pursuant to 23 U.S.C. § 106(a) and Policy and Procedures Memorandum (PPM) 20-8, the State Highway Department must obtain *design approval* and subsequently approval of *plans, specifications, and estimates* (P, S, and E) to be eligible for federal funding. The last approval stage is *construction approval,* at which time the state can receive federal funds. The state must have complied with certain requirements along the way in order to obtain the staggered approvals.

Prior to location approval the State must have held a public hearing, at which time a "corridor" is agreed upon. 23 U.S.C. § 128. Public hearings for the overall route location were held on November 14, 1960 and on April 14, 1961 in Hayward. Additional hearings for the portions in Fremont and in Union City were held on September 29, 1965 and on April 20, 1967, respectively. Plaintiffs allege that these meetings failed to comply with the requirements of 23 U.S.C. § 128 and Policy and Procedure Memorandum 20-8.

On October 5, 1965, the California Department of Public Works entered into a "freeway agreement" with the City of Hayward. In that agreement, the City approved that portion of Route 238 which would pass through Hayward and agreed to close certain

city streets when necessary to facilitate construction of the highway. The City also agreed to maintain and repair frontage roads built by the State. The Department of Public Works has not yet entered into an agreement with Union City, as Union City has refused to approve any extension of Route 238 within its city limits.

On November 4, 1966, the Federal Division Engineer for California gave federal "location approval" for Route 238. A key question here is what significance should be attached to this location approval. As stated above, this approval was the initial action necessary to qualify Route 238 for federal funds. State highway officials must still obtain federal design approval, P.S. & E. approval, and construction approval before the federal government is committed to finance construction. No such approvals have taken place.

The State has not requested, nor has it obtained, any federal funds for this project. There is a dispute as to whether the State will eventually request federal funds, plaintiffs saying "definitely" and defendants saying "probably not".

The State has already acquired a significant amount of land in Hayward—approximately 30-40% of the land it will need for the highway in that area. As a result of the State acquisition of land (and housing) in Hayward, persons residing on the right-of-way have been encouraged to leave and have left the area. There is a dispute as to the number of people who have left as "voluntary relocatees." Virtually no land has been purchased as yet in Union City or Fremont.

Plaintiffs have brought several causes of action to this court, seeking for the most part declaratory and injunctive relief. Under the first cause of action, they seek (a) a declaratory judgment that plaintiffs and their class are "displaced persons" under the Uniform Relocation Act, and that federal and state defendants do not have a satisfactory relocation program as required by the statutes; (b) an injunction enjoining the State defendants from acquiring any more property for right-of-way under the project and enjoining the federal defendants from granting any further approval of the project or providing funds for the project until a satisfactory relocation assistance program is devised; and (c) an order compelling state and federal defendants to show cause why funds committed to or available for the project should not be allocated for the construction or rehabilitation of housing units.

Second, plaintiffs seek a declaratory judgment and injunction against the City of Hayward in regard to replacement housing problems.

Third, plaintiffs allege that forcing the plaintiffs to confront a discriminatory and very tight housing market violates the equal protection clause of the fourteenth amendment, and seek relief consistent with this allegation.

Fourth, plaintiffs seek a declaratory judgment that the project falls within the National Environmental Policy Act and that defendants have failed to comply with the Act, as well as an injunction both preventing

State defendants from acquiring any more land for the project and forbidding the federal defendants from giving further approval to the project until the NEPA is complied with.

Fifth, plaintiffs seek similar relief under §4(f) of the Department of Transportation Act of 1966 [49 U.S.C. §1653(f)] and §138 of 23 U.S.C., both of which deal with the environment and which require the Secretary to minimize the harm to the environment after first assuring himself that no viable alternatives exist.

Sixth, plaintiffs allege that various hearing requirements have not been satisfied and that all work and approval of the project should be enjoined until the hearing requirements are complied with.

Seventh, plaintiffs further allege that the failure to hold adequate public hearings constitutes a violation of due process. They seek relief consistent with this allegation.

In an amendment to their complaint, plaintiffs claim that the state defendants are in violation of two State laws: the Ralph Act (Streets and Highways Code §§135.3-135.7) and the State Environmental Quality Act of 1970. The Ralph Act establishes a program for providing new or refurbished housing to "low-income individuals and families" who reside in an "economically depressed area." Plaintiffs seek a mandatory injunction under the Ralph Act and declaratory relief and an injunction under the State Environmental Quality Act of 1970.

II. Defendants' Motion to Dismiss

A. Jurisdiction over the Person

Both the state and federal defendants claim that sovereign immunity prevents the court from assuming jurisdiction here. In a condemnation setting the state normally cannot cannot be enjoined from acquiring land. In the present case, however, there is a question as to (1) the constitutionality of the state action, and (2) whether the officials involved have complied with state and federal statutes. Under *Ex Parte Young* 209 U.S. 123 (1908), these two situations are generally considered exceptions to the sovereign immunity doctrine. A state official who exceeds his authority or who violates the Constitution is not covered by the protective mantle of sovereign immunity. See, e.g., *Urbano v. Board of Managers,* 415 F.2d 247 (3d Cir. 1969).

In regard to the federal defendants, several cases, most notably *Larson v. Domestic and Foreign Corp.,* 337 U.S. 682 (1949), indicate rather strongly that if the federal official exceeds the authority vested in him, sovereign immunity does not apply, under the rationale that the person, not the sovereign, is being sued. Plaintiffs allege that the federal officials have not complied with statutory requirements; thus, sovereign immunity does not protect the federal officials here. See also *Citizens to Preserve Overton Park v. Volpe,* 401 U.S., 402 (1971).

B. Jurisdiction Over the Subject Matter

In most of the environmental protection and housing displacement cases where an injunction has been sought, the Secretary involved had already approved federal funds for the project. See e.g., *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971); *Western Addition Community Organization v. Weaver,* 294 F.Supp. 433 (N.D. Cal. 1968); *Citizens for the Hudson Valley and Sierra Club v. Volpe, et al.,* 425 F.2d 97 (1970), *cert. denied* 400 U.S. 949 (1970). In the present case, however, no federal funds have been contributed or authorized. Defendants argue that the project is therefore not a "federal-aid highway", and that the federal statutes and regulations do not apply until the project becomes a "federal-aid highway." Consequently, defendants have moved to dismiss plaintiffs' first and fourth causes of action on the grounds that plaintiffs have failed to state a claim upon which relief can be granted.

If a highway project is determined to be a "federal-aid highway", certain restrictions will eventually attach to the project against both the State and federal governments. For example, there must be (1) adequate hearings prior to location approval (23 U.S.C. §128); (2) an adequate relocation assistance program with replacement housing (23 U.S.C. §502, §§205, 210 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, DOT Instructional Memorandum (IM) 80-1-68, IM 80-1-71); and (3) assurances and determinations that any adverse consequences to the environment have been

considered and deemed necessary, in light of possible alternatives. (§138 of 23 U.S.C., §4(f), of the Department of Transportation Act of 1966, and DOT Order 5610.1).

Defendants argue that while a project becomes part of the federal-aid highway system upon location approval, the various restrictions do not apply until federal funds have been approved or federal participation is assured. Since Project 238 has received only location approval the federal requirements, according to defendants, do not yet apply. Any relief should be limited to an injunction preventing the Secretary of Transportation from giving his approval to further stages of the project until the state complies with the federal regulations. Plaintiffs, on the other hand, seem to argue that the statutes and regulations apply either upon location approval or when federal participation becomes inevitable.

Much of the argument on defendants' motion to dismiss has centered around semantic distinctions, but this court believes the basic issue to be as follows: do the federal regulations and statutes apply to a highway project upon location approval, construction approval, or some intermediate point when federal participation is assured?

One may conceptualize the problem as follows: there are three types or groups of highway projects. The first consists of those highways for which federal funds have been approved or are immediately sought. The parties agree that highways in this group are federal-aid highways. Federal participation here is

apparent, as federal funds have been appropriated or are about to be appropriated to the project.

The second group involves those state highways constructed without federal funds, and for which federal participation has never been sought, at any level. Congress very likely possesses the power to regulate the construction of these highways;[1] but one would be distorting the language of the statutes and regulations if one were to hold that the statutes and regulations apply to these highways.[2] It seems rather apparent that these "group II" highways are not federal-aid highways.

The third group of highways are those projects that may eventually receive federal funds. Normally there may be six to eight years between the corridor public hearing and construction approval. It is rather difficult to predict six years ahead of time whether or not federal funds will be needed; consequently, most states keep open the option on expensive projects by securing federal approval at various stages, in compliance with federal statutes.

The crucial question before this court is which of these "group III" projects are "federal-aid highways". As stated above, the state and federal defendants concede that a project becomes part of the federal-aid highway system upon location approval; they assert, however, that the statutes and regulations

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[1]See e.g., *Wickard v. Fillburn*, 317 U.S. 111 (1942).

[2]For example, under § 103 the federal-aid primary highway system within a state can be no more than 7% of the total mileage of a state highway system.

do not apply until the state actively seeks federal funds. Only at that point does a project become a "federal-aid highway" for the purpose of applying the statutes and regulations.[3] Plaintiffs seem to argue that a project becomes a federal-aid highway—and the federal regulations apply—when federal funding is highly likely or inevitable, or when the state indicates a definite intention to seek federal funds. (See Plaintiffs Supplemental Memorandum of September 13, 1971 at 19-23).

Both sides cite as authority *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department,* 40 U.S.L.W. 2098, August 24, 1971 (5th Cir., August 5, 1971); but that case is distinguishable from the one before us. In the *Conservation Society* case, the federal government had indicated at an early stage its intention to supply funds to the project. In the present case the state defendants have not received such assurances; indeed, the state asserts that it is highly unlikely that it will seek federal funds. In short, unlike the *Conservation Society* case, federal funding is far from "inevitable" here.

The state defendants cite a recent case to support their proposition that a project does not become a federal-aid highway—and the statutes do not apply—until federal funds are requested. *Northeast Area Welfare Rights Organization v. Volpe,* No. 3437 (D.

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[3]In other words, a project can be part of the federal-aid highway system but not be federal-aid highway until federal funds are approved. This semantic distinction merely disguises the crucial issue; when do the federal statutes and regulations apply to a project?

Wash. 1970). In that case, however, the project had not even received location approval, the most basic requirement for remaining eligible for federal funds. Unlike Project 238, the project in that case falls within "group II".

The court believes that for the purpose of applying the various federal statutes and regulations a federal-aid highway is any project for which the state has obtained location approval. The state should not have the considerable benefits that accompany an option to obtain federal funds without also assuming the attendant obligations. Any project that seeks even the possible protection and assistance of the federal government must fall within the statutes and regulations.

Several factors have convinced this court that the various federal restrictions are to apply against the defendants immediately. First, Congress has issued extremely strong policy statements against displacement and environmental destruction. 23 U.S.C. §501 reads as follows:

> Congress hereby declares that the prompt and equitable relocation and reestablishment of persons, businesses, farmers, and nonprofit organizations displaced as a result of the Federal highway programs and the construction of Federal-Aid highways is necessary to insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole. Therefore, Congress determines that relocation payments and advisory assistance should be provided to all persons so

displaced in accordance with the provisions of this title.

Section 201 of Title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 reads as follows:

> The purpose of this title is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.

Section 138 of 23 U.S.C. reads as follows:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public parks and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, state, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no

feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

Section 101 of the National Environmental Policy Act (NEPA) reads as follows:

Sec. 101. (a) The Congress recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may —

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintending consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depictable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Section 4(f) of the Department of Transportation Act of 1966 (DOT Act of 1966) is substantially the same as §138 of 23 U.S.C.

The legislative history of the Federal-Aid Highway Act of 1968, the Uniform Relocation Assistance Act

of 1970, Section 4(f) of the DOT Act of 1966, and the National Environmental Policy Act of 1969 shows an intense concern by the Congress over the problems of highway displacement and environmental protection. Prior to 1968, for example, the state was not required to make relocation payments to persons displaced by federal-aid highway projects. The 1968 Act required such payments, and the 1971 Act raised the level of such payments. See §§505, 506 of 23 U.S. C. and §§202, 203 of the Uniform Relocation Assistance Act of 1970. See also 1968 U.S. Code Congressional and Administrative News 3482-3539. Moreover, the 1968 and 1970 Acts both provide for federal advances for relocation payments before construction approval. See §504 and §208, with accompanying provisions. It seems rather clear to this court that Congress was well aware of the realities and hardships of highway displacement when it passed these acts, and that the main thrust and purpose of the 1968 and 1970 Acts was to protect displaced persons even before construction.

One reaches similar conclusions when examining the legislative history of the various environmental statutes and regulations; but one need not search that far to discover the Congressional intent here. NEPA, 23 U.S.C. §138, and §4(f) of the DOT Act of 1966 state in the *strongest* terms the importance that Congress attaches to environmental protection. As Justice Black stated in his concurrence in *Overton Park,* 28 L.Ed.2d at 156,

> That Congressional command [23 U.S.C. §138] should not be taken lightly by the Secretary or

> this Court. It represents a solemn determination of the highest lawmaking body of this Nation that the beauty and health-giving facilities of our parks are not to be taken away for public roads without hearings, fact-findings and policy determinations of a Cabinet officer—the Secretary of Transportation.

It is obvious, then, that strong federal policies exist towards adequate relocation assistance and protection of the environment.

A second factor this court believes significant is the language of the statutes and regulations themselves. By their very wording the statutes and regulations in question seem to apply to federal-aid projects *before* money has been appropriated and as early as location approval. Section 101(6) of the Uniform Relocation Assistance Act defines a displaced person as

> any person who, on or after the effective date of this act, moves from real property or moves his personal property from real property as a result of the acquisition of such real property in whole or in part, or as the result of the written order of the acquiring agency to vacate real property for a program or project undertaken by a federal agency, or with federal financial assistance.

The House Report accompanying the Bill describes this section as follows:

> If a person moves as a result of such a notice to vacate it is immaterial whether or not the real property is actually acquired.

It is immaterial whether the real property is acquired before or after the effective date of this bill, or by Federal or State agency; or whether federal funds contribute to the cost of the real property. The controlling point is that the real property must be acquired for a federal or federally assisted program or project. For example:

(a) A number of State highway departments frequently acquire rights-of-way for Federal-aid highways . . . with non-federal funds and seek federal financial assistance only for the actual construction work. Persons required to move from such rights-of-way are recognized as displaced persons under the relocation provisions of the Federal-Aid Highway Act of 1968 and this bill affirms that principle.

1970 U.S. Code Congressional and Administrative News 5853.

DOT Instructional Memorandum (IM) 80-1-71 (6) states that the regulations for displacement from highway projects apply to "any person who as of January 2, 1971 has not been displaced by any highway project on which federal-aid highway funds or other federal funds are or will be used."

IM 80-1-71 (7) also restricts the state at *any* phase of the project, not simply after federal funds have been appropriated.

"7.a. No State highway department shall be authorized to proceed with any phase of any project which will cause the relocation of any person, or proceed with any construction project concerning any right-of-way acquired by the State without Federal participation and coming within

the provisions of paragraph 6a of this memorandum until it has furnished satisfactory assurances on a statewide basis that:

(1) relocation payments and services were or will be provided as set forth in this memorandum;

(2) the public was or will be adequately informed of the relocation payments and services which will be available as set forth (below)."

IM 80-1-71 (12) provides as follows:

States shall establish a relocation assistance advisory services program in order to provide the maximum assistance possible to persons required to relocate because of a Federal or Federal-aid highway program.

IM 80-1-71 (15) provides as follows:

The division engineer shall not authorize the state to proceed with negotiations on any project which will cause the relocation of any person until the State has submitted and he has approved the project assurances as provided for in paragraph 7b of this memorandum and the relocation plan required by subparagraph "b" below.

There is also strong evidence that the environmental regulations are to apply immediately. DOT Order 5610.1 indicates that 4(f) statements are required for any formal approval by the Secretary. Paragraph 4(A) provides as follows:

The requirements in this order . . . calling for either a negative declaration or a statement pursuant to Section 102(c) of the NEP Act *apply to, but are not limited to,* the following. . . :

> all grants, loans, contracts, . . . plans, . . . formal approvals (e.g., of non-federal work plans) . . . [emphasis added].

Paragraphs 3 (c) (3) of the definitional guidelines that accompany DOT Order 5610.1 states that "federal actions" (that is, those programs to which the regulations apply) include "approval of State highway programs and plans prior to grant of money."

Finally, paragraph 1 of the definitional guidelines states "When there is doubt whether or not to prepare a statement it should be prepared."

From the regulations alone it appears to this court that 4(f) statements and adequate relocation assistance programs are required before location approval, prior to federal funding of a project.

Finally, in addition to the strong policy statements and the wording of the statutes and regulations, common sense dictates that the federal protective devices apply before federal funds are sought. It does little good to shut the barn doors after all the horses have run away. If the federal statutes and regulations are to supply any protection at all it must be prior to the time the residents have left and the deleterious effects to the environment have taken place. All the protections that Congress sought to establish would be futile gestures were a state able to ignore the spirit (and letter) of the various acts and regulations until it actually receives federal funds.[4] Given the realities

[4]Indeed, we have seen what happens when a court refuses to apply the protections at an early stage of construction. See *Triangle Improvement Council v. Ritchie*, 429 F.2d 423 (4th Cir. 1970), *cert. dismissed as improvidently granted*, 39 U.S. L.W. 4596.

of actual highway displacement and construction, the statutes and regulations must apply immediately or their purpose will be frustrated.

Plaintiffs have demonstrated that Project 238 is a federal-aid highway project, and this court now holds that Sections 205 and 210 of the Uniform Relocation Assistance Act of 1970, §4(f) of the Department of Transportation Act of 1966, 23 U.S.C. §138, and various supporting statutes and regulations *presently* apply against the State and federal defendants. Consequently the motion by the State and federal defendants to dismiss the first and fourth causes of action for failure to state a claim upon which relief can be granted must be denied.[5]

* * * * * * * * *

The City Manager and Mayor of the City of Hayward have also moved to dismiss for failure to state a claim upon which relief can be granted. Plaintiffs basically assert two theories for holding these defendants responsible for possible violations of federal regulations: (1) The Freeway Agreement dated October 5, 1965 between the State of California and the City of Hayward links the City with any wrongdoings by the State; (2) the City has an obligation under

[5]In the *Conservation Society* case the Fifth Circuit held that once a project is considered a federal-aid highway, and the federal statutes and regulations apply to the project, these statutes and regulations will continue to apply even if the project is financed completely by state funds. The court believes it is unnecessary to consider at this time whether the federal protective devices would continue to apply if the State forecloses the possibility of federal assistance. As long as the State remains eligible for federal assistance, the project will be considered a federal-aid highway and the various federal regulations and statutes apply.

42 U.S.C. §1451 (c) to increase the supply of low-cost housing.

Neither of plaintiffs' theories is valid here. Plaintiffs first want this court to enjoin the City from carrying out its part of the highway agreement, which is to close certain city streets in order to facilitate construction. Such an injunction, however, would be both inadequate and unfounded. If the City refuses to close the streets the State, at obvious inconvenience, could build the highway anyhow.[6] But even if this were not so, the municipal defendants have done nothing to justify such an injunction. The City of Hayward has simply entered into an agreement with the State—not the federal government—to assist in some way in the construction of Project 238. The submitted affidavits and exhibits have shown that the City receives very little benefit from such an agreement. In some cases a city might be bound through an "agency" theory, but this is not such a case. The thrust of plaintiffs' complaint is directed against the State; it is unnecessary and confusing to join the municipal defendants to the action.

Plaintiffs' third cause of action, which alleges a violation of 42 U.S.C. §1451 by the municipal defendants, must also be dismissed. Section 1451 is an urban renewal statute which may impose upon a city that has entered into a contractual agreement for urban renewal funds the duty to increase the supply of low-cost housing. Unlike *West v. Housing Authority of*

[6]See California Streets and Highways Code Sections 100.1 and 100.2.

the City of Atlanta, No. 13571 (N.D. Ga. (1971) and *Ley v. Shell Oil Co., et al.,* No. C-71 1645 RFP, which raise questions concerning the scope of §1451(c), there is no contractual agreement between the city and the federal government here; nor is this an urban renewal project. Moreover, the relevant statutes dealing with highway relocation—23 U.S.C. 501-11, and Uniform Relocation Assistance Act of 1970—impose no obligation upon the city to *increase* its supply of low-cost housing.

C. Standing

Defendants allege that all of the plaintiffs lack standing to raise the environmental issues in this suit. Certainly the plaintiffs residing in Hayward, Union City and Fremont have standing, as they shall be affected directly by any activities adverse to the environment. It is *their* parklands and forests that may be damaged. The State implies that plaintiffs must show that they own property adjacent to the park areas; the court disagrees. A showing that they use the park and live nearby is enough to satisfy the standing requirement for these plaintiffs.

Whether the Sierra Club has standing in this case is a more difficult question. Despite the Club's well-known history as a vigorous advocate of environmental causes, recent Ninth Circuit decisions would seem to preclude standing in this case. *Sierra Club v. Hickel,* 433 F.2d 24, *cert. granted* February 22, 1970; *Alameda Conservation Assoc., et al., v. State of California, et al.,* ..... F.2d ....., 1 ELR 20097 (1971). These cases contrast sharply with decisions in several other

circuits. See *Citizens Committee for the Hudson Valley and Sierra Cub v. Volpe, et al.*, 425 F.2d 97 (2d Cir. 1970), *cert. denied* 400 U.S. 949 (1970); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971). In order to resolve this conflict the Supreme Court has granted certiorari in *Sierra Club v. Hickel.*

In light of certain agreements by the parties and the history of the Sierra Club as a dedicated speaker for environmental causes, this court will grant the Sierra Club "conditional standing" to litigate this case, pending the Supreme Court decision in *Sierra Club v. Hickel.*

D. Class Action Questions

The federal defendants allege that plaintiffs have failed to satisfy the requirements for a class action under Rule 23 (a) of the Federal Rules of Civil Procedure. Specifically, they assert that "there are not questions of law or fact common to the class, nor are there typical claims or defenses common to all the plaintiffs or the class they purport to represent." (Federal Defendants' Brief of August 17, 1971 at p. 21). The court disagrees. See *Norwalk Core v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968).

II. Plaintiff's Motion for Preliminary Injunction

From the above discussion it is apparent that Project 238 became a federal-aid highway project on November 4, 1966, the day it received federal location

approval. Such status necessarily entails certain responsibilities with regard to displaced persons and environmental protection. The various statutes and regulations apply immediately; they are not suspended until the State applies for federal funds. The court must now determine (1) whether the State has satisfied the requirements of the statutes and regulations, and (2) if it has not satisfied these requirements, whether a preliminary injunction should issue.

The various statutes and regulations, as discussed above, impose numerous constraints upon both the State and Federal governments in the cases of federal-aid highway projects. From various affidavits it appears that a substantial number of people have been displaced or are about to be displaced from the project. From the evidence thus far presented it also appears that, despite sincere efforts, the State has an inadequate relocation assistance program, as defined by §205 of the Uniform Relocation Assistance Act of 1970 and IM 80-1-71. The State, albeit in good faith, has failed to comply with the federal relocation statutes and regulations.

It is the determination of this court that a preliminary injunction should issue for these violations. Plaintiffs satisfy all of the requirements for a preliminary injunction:[7]

1. The harm to plaintiffs and the class they represent is clearly irreparable. One who is forced to vacate his chosen neighborhood or city, to sever long-standing

[7]See 7 Moore, Federal Practice ¶ 65.04.

friendships, to confront a tight and possibly discriminatory housing market, and to incur other indignities that are likely to be present here suffers severe and irreparable injury. Only after legislatively-authorized procedures have been complied with should displacement be permitted.

2. There is a high probability that plaintiffs will prevail on the merits.

3. The public interest favors the granting of the injunction. See 23 U.S.C. §501, IM 80-1-71, and Policy and Procedure Memorandum 20-8.

4. Any harm to defendants is clearly outweighed by the harm to plaintiffs were the preliminary injunction not issued.

The environmental regulations can be approached in a similar fashion. Though the State presently is attempting to compile 4(f) statements, no such statements have yet been submitted. As was discussed above, such statements are required when a project is likely to have an impact on the environment. See DOT Order 5610.1.

From the evidence presented it appears that Project 238 will have a most significant impact on the environment. The highway will probably cut through three parks: the Hayward Botanical Gardens, Hayward Memorial Park, and Fremont Central Park. There is also evidence that certain portions of Project 238 are proposed to be constructed over known fault areas. See Plaintiffs' Exhibit 42, affidavit of Professor George P. Simonds. These were the types of factors

Congress deliberately wanted to be taken into account when it said in §4(f) and §138:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, state, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

The court finds that a §4(f) statement is required for the 238 Project at the present stage of development. No more land should be acquired nor should any action be undertaken which would materially affect the environment until 4(f) statements have

been prepared and the Secretary is satisfied that (1) no feasible alternative route exists, and (2) any harm to the environment has been minimized.[8]

Dated, November 8, 1971.

/s/ Robert F. Peckham,
United States District Judge

Original Filed November 9, 1971,
Clerk, U.S. District Court,
San Francisco, California.

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[8]Plaintiffs also claim that (1) defendants' forcing them and members of their class to confront an allegedly discriminatory housing market violates the equal protection clause of the Fourteenth Amendment (third cause of action); (2) defendants have violated the National Environmental Policy Act of 1969 (fourth cause of action); (3) defendants have failed to hold proper hearings in compliance with 23 U.S.C. § 128 (sixth cause of action); (4) the failure to hold adequate hearings denied plaintiffs due process of law (seventh cause of action); (5) state defendants have violated the Ralph Act, California Streets and Highways Code §§ 135.3-135.7 (eighth cause of action); and (6) state defendants have violated the State Environmental Quality Act of 1970, California Public Resources Code, §§ 21000, et seq. (ninth cause of action). The complex questions raised by these claims need not be considered at this point in the litigation, as a preliminary injunction is sufficiently supported by other considerations.

In The United States District Court
Northern District of California

No. C-71 1166 RFP

La Raza Unida, The Sierra Club, et al.,
Plaintiffs,

vs.

John A. Volpe, et al.,
Defendants.

PRELIMINARY INJUNCTION

1. It Is Hereby Ordered, Adjudged, and Decreed, that pending the further Order of the Court, state defendants, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them or any of them are, each and all, hereby restrained and enjoined from:

(a) Acquiring any further real property in the Cities of Hayward, Union City, and Fremont, California, for right-of-way for the Route 238 Project; and

(b) Attempting to remove, threatening to remove, or acting to remove (by initiating contacts or making solicited or unsolicited offers or otherwise) any resident of premises located on or near proposed right-of-way for the Route 238 Project; and

(c) Undertaking any other actions whatsoever in connection with the Route 238 Project that would materially affect the environment.

2. It Is Further Hereby Ordered, Adjudged and Decreed, that commencing immediately, and thereafter until the further order of this Court, defendant VOLPE, his officers, agents, servants, employees, attorneys, and all persons in active concert with them or any of them, each and all, are hereby restrained and enjoined from continuing to accord or to accord any approval to the Route 238 Project or plans, maps, or other documents connected therewith.

3. It Is Further Hereby Ordered, Adjudged and Decreed, that no person restrained and enjoined by this Preliminary Injunction shall undertake to avoid compliance by any indirection.

4. Any person enjoined by this Preliminary Injunction may move for termination upon showing that Federal and State defendants have fully and reasonably complied with Sections 205 and 210 of the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970, P.L. 91-646, 84 Stat. 1894; Section 502(3) of the Federal-Aid Highway Act of 1968, 23 U.S.C. 502(3); Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 1653(f); Section 138 of the Federal-Aid Highway Act of 1968, 23 U.S.C. 138, and all Federal regulations promulgated under each of said statutes.

Dated, November 8, 1971.

/s/ Robert F. Peckham,
United States District Judge.

Appendix C

23 U.S.C. §103

§103. *Federal-aid systems*

(a) For the purposes of this title, the three Federal-aid systems, the primary and secondary systems, and the Interstate System, are continued pursuant to the provisions of this section.

(b) The Federal-aid primary system shall consist of an adequate system of connected main highways, selected or designated by each State through its State highway department, subject to the approval of the Secretary as provided by subsection (e) of this section. This system shall not exceed 7 per centum of the total highway mileage of such State, exclusive of mileage within national forests, Indian, or other Federal reservations and within urban areas, as shown by the records of the State highway department on November 9, 1921. Whenever provision has been made by any State for the completion and maintenance of 90 per centum of its Federal-aid primary system, as originally designated, said State through its State highway department by and with the approval of the Secretary is authorized to increase the mileage of its Federal-aid primary system by additional mileage equal to not more than 1 per centum of the total mileage of said State as shown by the records on November 9, 1921. Thereafter, it may make like 1 per centum increases in the mileage of its Federal-aid primary system whenever provision has been made for the completion and maintenance of 90 per centum

of the entire system, including the additional mileage previously authorized. This system may be located both in rural and urban areas. The mileage limitations in this paragraph shall not apply to the District of Columbia, Hawaii, Alaska, or Puerto Rico.

(c) The Federal-aid secondary system shall be selected by the State highway departments and the appropriate local road officials in cooperation with each other, subject to approval by the Secretary as provided in subsection (e) of this section. In making such selections, farm-to-market roads, rural mail routes, public school bus routes, local rural roads, county roads, township roads, and roads of the county road class may be included, so long as they are not on the Federal-aid primary system or the Interstate System. This system may be located both in rural and urban areas, but any extension of the system into urban areas shall be subject to the condition that such extension pass through the urban area or connect with another Federal-aid system within the urban area.

(d) (1) The interstate System shall be designated within the United States, including the District of Columbia, and, except as provided in paragraphs (2) and (3) of this subsection, it shall not exceed forty-one thousand miles in total extent. It shall be so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers, to serve the national defense and, to the greatest extent possible, to connect at suitable border points with routes of continental importance in the Dominion of Canada and the Republic of Mex-

ico. The routes of this system, to the greatest extent possible, shall be selected by joint action of the State highway departments of each State and the adjoining States, subject to the approval by the Secretary as provided in subsection (e) of this section. All highways or routes included in the Interstate System as finally approved, if not already coincident with the primary system, shall be added to said system without regard to the mileage limitation set forth in subsection (b) of this section. This system may be located both in rural and urban areas.

(2) In addition to the mileage authorized by the first sentence of paragraph (1) of this subsection, there is hereby authorized additional mileage for the Interstate System of two hundred miles, to be used in making modifications or revisions in the Interstate System as provided in this paragraph. Upon the request of a State highway department the Secretary may withdraw his approval of any route or portion thereof on the Interstate System within that State selected and approved in accordance with this title prior to the enactment of this paragraph, if he determines that such route or portion thereof is not essential to completion of a unified and connected Interstate System (including urban routes necessary for metropolitan transportation) and will not be constructed as a part of the Interstate System, and if he receives assurances that the State does not intend to construct a toll road in the traffic corridor which would be served by such route or portion thereof. After the Secretary has withdrawn his approval of

any such route or portion thereof the mileage of such route or portion thereof and the additional mileage authorized by the first sentence of this paragraph shall be available for the designation of interstate routes or portions thereof as provided in this subsection. The provisions of this title applicable to the Interstate System shall apply to all mileage designated under the third sentence of this paragraph, except that the cost to the United States of the aggregate of all mileage designated under the third sentence of this paragraph shall not exceed the cost to the United States of the aggregate of all mileage approval for which is withdrawn under the second sentence of this paragraph, as such cost is included in the 1968 Interstate System cost estimate set forth in House Document Numbered 199, Ninetieth Congress, as revised. In considering routes or portions thereof to be added to the Interstate System under the third sentence of this paragraph, the Secretary shall, in consultation with the States and local governments concerned, give due regard to (A) routes or portions thereof in States in which the Secretary has heretofore or hereafter withdrawn his approval of other routes or portions thereof, and (B) the extension of routes which terminate within municipalities served by a single interstate route, so as to provide traffic service entirely through such municipalities.

(3) In addition to the mileage authorized by paragraphs (1) and (2) of this subsection, there is hereby authorized additional mileage of not to exceed 1,500 miles for the designation of routes in the same manner

as set forth in paragraph (1), in order to improve the efficiency and service of the Interstate System to better accomplish the purposes of that System.

Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 887 as amended by Pub.L. 86-70, §21(d)(1), June 25, 1959, 73 Stat. 145; Pub.L. 86-624, §17(b), (c), July 12, 1960, 74 Stat. 415; Pub.L. 87-866, §8(a), Oct. 23, 1962, 76 Stat. 1147: Pub. L. 90-238, Jan. 2, 1968, 81 Stat. 772; Pub.L. 90-495, §§14, 21, Aug. 23, 1968, 82 Stat. 822, 826.

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23 U.S.C. § 105

§ 105. *Programs*

(a) As soon as practicable after the apportionments for the Federal-aid systems have been made for any fiscal year, the State highway department of any State desiring to avail itself of the benefits of this chapter shall submit to the Secretary for his approval a program or programs of proposed projects for the utilization of the funds apportioned. The Secretary shall act upon programs submitted to him as soon as practicable after the same have been submitted. The Secretary may approve a program in whole or in part, but he shall not approve any project in a proposed program which is not located upon an approved Federal-aid system.

(b) In approving programs for projects on the Federal-aid secondary system, the Secretary shall require, except in States where all public roads and

highways are under the control and supervision of the State highway department, that such project be selected by the State highway department and the approriate local officials in cooperation with each other.

(c) In approving programs for projects on the Federal-aid primary system, the Secretary shall give preference to such projects as will expedite the completion of an adequate and connected system of highways interstate in character.

(d) In approving programs for projects under this chapter, the Secretary may give priority of approval to, and expedite the construction of, projects that are recommended as important to the national defense by the Secretary of Defense, or other official authorized by the President to make such recommendation. Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 891; Pub.L. 86-624, § 17(b), July 12, 1960, 74 Stat. 415.

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23 U.S.C. §106

§ 106. *Plans, specifications, and estimates*

(a) Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his ap-

proval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title.

(b) In addition to the approval required under subsection (a) of this section, proposed specifications for projects for construction on the Federal-aid secondary system, except in States where all public roads and highways are under the control and supervision of the State highway department, shall be determined by the State highway department and the appropriate local officials in cooperation with each other.

(c) Items included in any such estimate for construction engineering shall not exceed 10 per centum of the total estimated cost of a project financed with Federal-aid primary, secondary, or urban funds, after excluding from such total estimated cost, the estimated costs of rights-of-way, preliminary engineering, and construction engineering: *Provided,* That such limitation shall be 15 per centum in any State with respect to which the Secretary finds such higher limitation to be necessary. For any project financed with interstate funds, such limitation shall be 10 per centum.

Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 892 as amended by Pub.L. 88-157, §7(a), Oct. 24, 1963, 77 Stat. 278.

23 U.S.C. §138
and
49 U.S.C. §1653(f)
82 Stat. 823

SEC. 18. (a) Section 138 of title 23, United States Code, is amended to read as follows:

"§ 138. Preservation of Parklands

"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate

[82 Stat. 824]

and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm

to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

(b) Section 4(f) of the Department of Transportation Act (80 Stat. 931; Public Law 89-670) is amended to read as follows:

"(f) It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

MEMORANDUM

FILE COPY

FILED

MAY 25 1974

MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1375

THE CALIFORNIA HIGHWAY COMMISSION, ET AL.,

Petitioners,

vs.

LA RAZA UNIDA, ET AL.,

Respondents.

Memorandum Opposing Certiorari

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I.

PRELIMINARY STATEMENT

This is the second petition for certiorari filed by the California Highway Commission in this case. (The first, No. 71-1394, was filed prior to the decision of the U.S. Court of Appeals for the Ninth Circuit in an effort to have this Court consolidate the instant case with *Texas Highway Dept. v. Named Individual Members of the San Antonio Conservation Society,* No. 71-1198, in which certiorari was subsequently denied. 406 U.S. 933.) Certiorari was originally denied in this case on October 10, 1972. 93 S.Ct. 105.

Furthermore, the instant petition for certiorari is jurisdictionally out of time, since it was docketed with this

Court on March 11, 1974, twelve days after expiration of 90 days from the decision of the U.S. Court of Appeals for the Ninth Circuit on November 29.

Considering that the argument they advance has been repeatedly rejected at every stage in this litigation, and that the Secretary of the U. S. Department of Transportation and other federal highway officials, originally the main defendants, declined to pursue an appeal even to the Ninth Circuit, petitioners' perseverance is commendable. However, as will be seen, there is absolutely no merit to their argument; and the federal courts which have addressed the issue are in complete agreement with the decisions of the District Court and the Court of Appeals in the instant case.

Since the decisions below are lucid and well-reasoned, respondents will in this memorandum concentrate on aspects of the federal regulatory scheme and other authorities not dealt with by the lower courts but which further support their conclusions. A comprehensive description and analysis of the complex administrative process respecting federal-aid highways, which in the interest of brevity is not reiterated in this Memorandum, may be found in Peterson & Kennan, *The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretations*, 2 Environ. L.Rptr. 50001 (1972).

II.

ARGUMENT

A. Congress Intended That Federal Statutes Protecting Displacees and the Environment Be Applicable to Highway Projects, Such as That Here Involved, Where Location Is Fixed and Displacement Has Begun.

Two types of federal statutes are involved in this case: first, statutes designed to protect persons who will be relocated by a highway project and, second, statutes intended

to protect the environment generally and public parks in particular. These will be dealt with in turn.

1. FEDERAL RELOCATION REQUIREMENTS.

Federal relocation requirements are contained in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601, *et seq.* (hereinafter the "URA"). As will be seen, the conclusions of the lower courts that the URA is applicable to the Route 238 Project is compelled by the clear language of the Act and implementing regulations, by the legislative history, and by common sense and the fact that any different conclusion would make a mockery of the law. Moreover, in cases virtually identical to that here presented, the courts explicitly held that the URA became "immediately" applicable to highway projects previously accorded program and location approvals regardless of whether federal funds were yet committed. *Lathan v. Volpe,* 455 F.2d 1111, 1119 (9th Cir. 1971). Accord, *Keith v. Volpe,* 352 F.Supp. 1324 (C.D. Cal. 1972). *Cf. Sierra Club v. Volpe,* 351 F.Supp. 1002 (N.D. Cal. 1972).

The declaration of policy set forth in the URA states that the purpose of the Act "is to establish a uniform policy for the equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." 42 U.S.C. § 4621. Section 4630 provides that the head of a federal agency shall not approve any project eligible to receive federal assistance "which will result in the displacement of any person" unless he receives certain "satisfactory assurances." Pursuant to section 4625(c)(3), these "satisfactory assurances" must state, on the basis of evidence, that:

> . . . *within a reasonable period of time prior to displacement* there will be available in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by such Federal agency head, equal in number to the number of and available to such displaced persons who require such dwellings and reasonably accessible to their places of employment . . . (Emphasis added.)

The federal regulations that implement the URA are for the most part contained in Instructional Memorandum ("IM") 80-1-71 (April 30, 1971) and DOT Order 5620.1 (June 24, 1970). Pertinent provisions of IM 80-1-71 were referred to at length by the District Court, and need not be reiteriated here.

Respondents submit that, for the reasons set forth by the lower courts herein and in *Lathan v. Volpe, supra*, 455 F. 2d at 1124, (cf. *Sierra Club v. Volpe, supra*, 351 F.Supp. at 1006-1009), there can be no doubt that Congress intended the requirements of Section 4630 to apply prior to the federal commitment to fund a particular project. This intention is manifested most directly in the portion of the House Report describing Section 101(6) of the URA, 42 U.S.C. § 4601(6), wherein it is recognized that:

> A number of State highway departments frequently acquire rights-of-way for Federal-aid highways . . . with non-Federal funds, and seek Federal financial assistance only for the actual construction work. Persons required to move from such rights-of-way are recognized as displaced persons under the relocation provisions of the Federal-Aid Highway Act of 1968 and this bill affirms that principle. (1970 U.S. Code Congressional and Administrative News, p. 5853.)

Federal regulations additional to those discussed by the lower courts also confirm that federal law applies prior to the actual transfer of federal funds. For example, DOT Order 5620.1 (June 24, 1970) entitled *Replacement Housing Policy* states the policy of DOT that no person shall be displaced by the Department's Federally-assisted projects "unless and until adequate replacement housing has already been provided for or is built." To accomplish this policy the Order directs that the following "principal point . . . must" be carried out:

> Specific written assurances that adequate replacement housing will be available or provided for (built if necessary) will be required *before the initial approval or endorsement of any project*. DOT Order 5620.1, § 2(a). (Emphasis added.)

Location approval is undoubtedly the "initial approval or endorsement" contemplated by the foregoing Order, since the proposed location of a highway determines how many persons will need to be displaced and permits the state highway department to determine whether existing replacement housing is adequate under 42 U.S.C. § 4625(c)(3). Further, PPM 20-8 states that a highway project may receive location approval "only after . . . the requirements of this PPM and of *other applicable laws and regulations*" are met. PPM 20-8, Par. 10d(1) (Jan. 14, 1969) (emphasis added). Clearly, the URA, IM 80-1-71 and DOT Order 5620.1 are among the "applicable laws and regulation" whose requirements must be met as a condition of federal location approval. But it is conceded that these requirements were not met in the instant case.

The language of the statutes and regulations and the intent of Congress as manifest in the legislative history are not the only reasons this Court should not disturb the

decisions below. Perhaps the strongest reason is that a conclusion different from that reached below would be at war with common sense. This point was emphasized by the District Court as follows: (337 F.Supp. at 231)

> . . . in addition to the strong policy statements and the wording of the statutes and regulations, common sense dictates that the federal protective devices apply before federal funds are sought. It does little good to shut the barn doors after all the horses have run away. If the federal statutes and regulations are to supply any protection at all it must be prior to the time the residents have left and the deleterious effects to the environment have taken place. All the protections that Congress sought to establish would be futile gestures were a state able to ignore the spirit (and letter) of the various acts and regulations until it actually receives federal funds. *Given the realities of actual highway displacement and construction, the statutes and regulations must apply immediately or their purpose will be frustrated.* (Emphasis added.)

By their own admission (Affidavit of Leif C. Hatlen, I C.T. 466:5) petitioners displaced 190 families from right-of-way for the Route 238 Project prior to the District Court's injunction without first providing the relocation assurances required by the URA. In other words, to borrow Judge Peckham's metaphor, some of the "horses" have already escaped—though closing the barn doors now can still protect the thousands that remain. If, as petitioners urge, operation of the URA is delayed until a formal "project agreement" is executed pursuant to 23 U.S.C. § 110—at which time displacement is completed—the requirements of the Act would be rendered an exercise in futility, since there would then be no one left to protect.

It is important to note, in this respect, that in highway relocation cases in which the plaintiffs failed to obtain

injunctive relief prior to displacement, appellate courts have treated the issues as moot and reluctantly refused to intercede, notwithstanding the recognition of a legal violation. *Concerned Citizens for the Preservation of Clarksville v. Volpe,* 445 F.2d 486 (5th Cir. 1971). See also, *Triangle Improvement Council v. Ritchie,* 402 U.S. 497 (1971), Cf. *Nashville I-40 Steering Committee v. Ellington,* 387 F.2d 179 (6th Cir. 1967), *cert. denied,* 390 U.S. 921 (1968). Petitioners' legal position is thus exposed as a *Catch 22* proposition; namely, that the law does not protect displacees from injury until after the injury becomes wholly irreparable; but once the injury is irreparable the courts are powerless to fashion a remedy.

In *Lathan v. Volpe, supra,* as in the present case, state highway officials admittedly commenced displacement prior to compliance with the federal relocation requirements. In defense, they claimed, as do petitioners here, that compliance was not required until "final federal approval" was given, which had not yet occurred. 455 F.2d at 1119. A unanimous appellate panel rejected the argument, stating that "[i]n our opinion, the defendants' view is not supported either by the language of the statute or by its purpose." *Id.* After examining the terms of the statute and concluding that its prohibited initial federal approval until the relocation requirements were first met, the court turned to the policies involved.

> The policies behind the enactment of [the federal relocation requirements] point to the same conclusion. The purpose . . . is to protect all persons who *will be* displaced from their homes because of a federal-aid highway program. Nothing in its language, or in the legislative history cited to us, suggests that it is to become fully operative only when the final design is approved and actual condemnation proceedings are authorized. *If the purpose of the statute is to be*

> *accomplished, it must be fully implemented not later than the approval of the "corridor" or "route" of the highway* under section 106. At that point, the route is known, although the precise location of the right of way within it is not. At that point all of the pressures leading to displacement come into play. Unless the state is then in a position to give the statutory assurances as defined by the Secretary, there is danger that displacements will proceed without anyone's knowing whether the requirements of the statute can be fully met. 455 F.2d at 1119 (Emphasis added.)

Elsewhere in its opinion, the court in *Lathan* noted that "[t]he longer there is delay in applying [the relocation requirements] . . . the fewer will be the residents of the corridor who receive the full benefit of the [law]." 455 F.2d at 1117.[1] The validity of this point has been recognized in every recent law review article concerning judicial enforcement of laws protecting highway displacees. See, e.g., Roberts, *Highway Relocation Planning and Early Judicial Review*, 7 Harv. Jour. on Legis. 179 (1970); Hartman,

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1. It bears emphasizing that state highway departments have a strong incentive to encourage the early flight of residents from proposed right-of-way—euphemistically referred to as "voluntary self-relocation." Note, *The Interest in Rootedness: Family Relocation and an Approach to Full Indemnity*, 21 Stan.L.Rev. 801, 837-838 (1969). As stated in the Affidavit of John H. Denton (Pls. Ex. 30, pp. 20-21), early "self-relocatees" need not be counted among those whom the State must eventually include in the relocation workload once condemnation commences, and the greater the number of early "self-relocatees" the easier it becomes for the state to demonstrate the futility of holding out to those who remain. Further, as also pointed out in the Denton Affidavit, vacant property invariably leads to vandalism which further lowers the market value the State will pay for adjacent properties. The Denton Affidavit describes actions of appellants calculated to encourage so-called "voluntary relocation" of residents of right-of-way for Route 238. (Pls. Ex. 30, p. 20.) See also, Affidavits of Eleven Individual Named Plaintiffs (Pls. Ex. 1); Affidavit of Gilbert M. Dorame (Pls. Ex. 26); Affidavit of James T. Grace (Pls. Ex. 30A, p. 5); and Affidavit of Bert G. Perez (Pls. Ex. 35, p. 2).

Relocation: Illusory Promises and No Relief, 57 Va.L.Rev. 745 (1971), and Peterson & Kennan, *The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretation*, 2 ELR 50001 (1972).

2. FEDERAL ENVIRONMENTAL REQUIREMENTS.

The federal environmental laws involved in this case are the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, *et seq.* (hereinafter "NEPA"), Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 16533(f), and Section 138 of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138. (The latter two statutes are identical and will hereinafter be collectively referred to as "Section 4(f).")

The NEPA, which in the short period since its enactment on January 1, 1970, has been the subject of a great deal of litigation involving federal-aid highways,[2] was most comprehensively described by the Court of Appeals for the District of Columbia in its landmark opinion in *Calvert Cliffs Coordinating Committee v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

After stating national policy "that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands," and directing the Secretary of Transportation to develop plans and programs "that include measures to maintain or enhance the

2. See, e.g., *Arlington Coalition v. Volpe*, 458 F.2d 1323 (4th Cir. 1972); *Brooks v. Volpe*, 460 F.2d 1193 (9th Cir. 1972); *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971); *Morningside-Lenox Park Ass'n v. Volpe*, 334 F.Supp. 132 (N.D. Ga. 1971); *Nolop v. Volpe*, 333 F. Supp. 1364 (D.So.Dak. 1971); *Environmental Law Fund v. Volpe*, 340 F. Supp. 1328 (N.D. Cal. 1972); *Harrisburg Coalition Against Ruining the Environment v. Volpe*, 330 F. Supp. 918 (M.D. Pa. 1971); *Keith v. Volpe*, 352 F. Supp. 1324 (C.D. Cal. 1972); *Daly v. Volpe*, 350 F. Supp. 252 (W.D. Wash. 1972); and *Sierra Club v. Volpe*, 351 F. Supp. 1002 (N.D. Cal. 1972).

natural beauty of the lands traversed [by highways],: Section 4(f) provides that:

> . . . the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wild-life and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

The purpose of Section 4(f) was discussed by this Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), and by the Fifth Circuit in *Named Individual Members of San Antonio Conservation Society v. Texas Highway Dept.*, 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 403 U.S. 932. As stated by Justice Marshall in the former case, the very existence of [Section 4(f)] indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes."[3] 401 U.S. at 413.

Unlike the URA, the three environmental statutes just described impose no duties on the states but "operate only

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3. The implications of Section 4(f) are discussed in Note, *Favoring Parks Over Highways—A First Step Toward Resolving the Conflict Between Preservation of Environmental Amenities and Expansion of the Highway System*, 57 Iowa L. Rev. 834 (1972).

upon federal agencies." *Ely v. Velde,* 451 F.2d 1130, 1139 (4th Cir. 1971). Therefore, the lower court's decision granting injunctive relief for violation of these statutes operated only against federal defendants. It is significant in this regard that the federal defendants did not appeal the District Court's order to the Ninth Circuit and are no longer directly involved in this case; a fact which places petitioners in a somewhat awkward position. In any event, the important point is that the District Court recognized that NEPA and Section 4(f) operate only against the federal defendants and fashioned relief accordingly. This fact vitiates petitioners' argument that the State is not bound by federal law since, with respect to NEPA and Section 4(f), the lower court apparently agreed (as do respondents) and deemed the argument irrelevant, and the government agency which is bound did not appeal.

To the extent that petitioners' argument may be construed to imply that NEPA and Section 4(f) do not operate even against federal highway officials until they actually fund a particular project, it has already been rejected by numerous courts. Before discussing the cases, however, it must be noted that federal regulations implementing both NEPA and Section 4(f) contemplate application of these laws well before final federal approval. For example, DOT Order 5610.1 (Oct. 7, 1970) outlines procedures for the DOT regarding the preparation of "detailed environmental statements" on proposed highway projects. Paragraph 1 of the Order states that Section 102(2)(C) statements "should serve as the vehicle for all environmental findings determinations and clearances required under any [environmental] legislation applicable to the Department of Transportation [such as Section 4(f)]." Paragraph 4(a) provides that "[t]he requirements of this Order (para-

graph 7 below) calling for either a negative declaration or a statement pursuant to Section 102(2)(C) of the NEPA apply to . . . formal approvals (e.g., of non-federal work plans) . . ." Paragraph 7(d) of the Order makes it absolutely clear that the DOT intended NEPA to apply at the "earliest possible point in time"; this paragraph states as follows:

> d. *Draft Statement.* Draft statements shall be prepared *at the earliest practicable point in time. They should be prepared early enough in the process so that the analysis of the environmental effects and the exploration of alternatives with respect thereto are significant inputs to the decision-making process.* (Emphasis added.)

Pursuant to other DOT and FHWA regulations, there is no doubt whatsoever that the foregoing environmental statements must be prepared at the location approval stage. For example, Paragraph 10 of PPM 20-8 (Jan. 14, 1969)[4] provides an elaborate description of what is to take place at the location approval stage. Among other things, this paragraph states that: "Each request by a State highway department for approval of a route location . . . must include a study report containing . . . descriptions of the alternatives considered and a discussion of the anticipated . . . environmental effects of the alternatives, pointing out the significant differences and the reasons supporting the proposed location or design."

In short, petitioners' position with respect to application of the federal environmental laws is essentially the

4. This regulation, which is still in effect, issued prior to enactment of NEPA and was originally intended to implement the environmental requirements of Section 4(f) and 23 U.S.C. §§ 128 and 138. As stated in DOT Order 5610.1, *supra*, these same procedures are now also utilized to implement NEPA.

same as their *Catch-22* position vis-a-vis the URA. They claim that NEPA and Section 4(f) are only enforceable at the final approval stage. But, as petitioners are well aware, at that stage a highway project is a *fait accompli* and the courts could not equitably fashion a suitable remedy. Further, if plaintiffs knowingly sat on their environmental rights until the final approval stage of a project, they would probably be found guilty of laches, as were the plaintiffs in *Clark v. Volpe*, 342 F. Supp. 1324 (E.D. La. 1972), *aff'd*, 461 F.2d 1266 (5th Cir. 1972), who did not even wait that long.

The argument that NEPA and Section 4(f) do not apply to a federal project that has not received final federal approval is also undermined by the fact that in *none* of the scores of cases in which federal courts have enjoined highways for failure to comply with NEPA and/or Section 4(f) had the project progressed to the final approval stage, and in most it had not even progressed beyond the location approval stage. See, e.g., *Brooks v. Volpe*, 460 F.2d 1193 (9th Cir. 1972); *Arlington Coalition v. Volpe*, 458 F.2d 1323 (4th Cir. 1972); *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971); *Sierra Club v. Volpe*, 351 F. Supp. 1002 (N.D. Cal. 1972); *Keith v. Volpe*, 352 F. Supp. 1324 (C.D. Cal. 1972); *Scherr v. Volpe*, 336 F. Supp. 882 (W.D. Wis. 1971); *Morningside-Lenox Park Ass'n v. Volpe*, 334 F. Supp. 132 (N.D. Ga. 1971); *Nolop v. Volpe*, 333 F. Supp. 1364 (D.So.Dak. 1971); *Harrisburg Coalition Against Ruining the Environment*, 330 F. Supp. 918 (M.D. Pa. 1971).

From an environmental point of view, the most important decision ever made with respect to any particular highway project is whether, in the first place, the project should even be built and, if so, where. Section 102(2)(C) of NEPA lists five general topics that an impact statement must con-

sider. The third requirement—that the statement consider "alternatives to the proposed action"—is a crucial one. Thus, as Judge Pregerson stated in *Keith v. Volpe, supra,* the statement "should consider all possible alternatives to the proposed freeway, including . . . changes in the route . . . *and even abandonment of the project entirely.*" 351 F. Supp. at 1336. (Emphasis added.) See also, *Calvert Cliffs, supra,* 449 F.2d at 1114. A statement considering such alternatives is of no purpose at the final approval stage since then, years after location has been approved, right-of-way acquired, residents displaced and land cleared, there truly are no "feasible" alternatives. As a unanimous panel of the Fifth Circuit recently stated, "[t]he purpose of [NEPA and Section 4(f)] is not served . . . when suit is delayed until after the environment is substantially altered." *Clark v. Volpe,* 461 F.2d 1266 (5th Cir. 1972). See also, *Calvert Cliffs, supra,* 449 F.2d at 1128.

In short, if this Court does not hold that NEPA and Section 4(f) are currently applicable, and affirm the decision below, these statutes will *never* be applicable and the will of Congress will have been thwarted.

B. Having Sought and Obtained Program and Location Approvals of the Route 238 Project, and Having Received the Benefits Thereof, the State Is Now Inextricably Bound by the Federal Relocation Requirements.

The thesis of the petition herein is presumably that federal highway officials (and federal courts) have no authority to enforce federal relocation and environmental laws until the federal government is contractually committed to fund a particular project. It is at that point, they claim, that a project, previously made part of the federal-aid primary system, first becomes a "federal project."[5]

5. Petitioners do not dispute that the Route 238 Project has long been a part of the federal-aid primary system in California.

Petitioners further maintain that, but for the grant-in-aid aspect of the federal-aid highway program, Congress could not impose many conditions which are beyond its powers under a regulatory or direct command scheme. This novel argument is totally without merit.

1. THE POWER OF THE FEDERAL GOVERNMENT TO REGULATE HIGHWAY ACTIVITIES IS NOT BASED ON THE GRANT-IN-AID FEATURES OF THE HIGHWAY PROGRAM.

Petitioners' arguments completely ignore the fact that the power of the federal government to regulate highway construction derives, not from the grant-in-aid features of the highway program, but from four constitutional grants: the authorities to regulate interstate commerce,[6] to establish post roads,[7] and to provide by the expenditure of tax revenues for the national defense and general welfare,[8] with the logical extensions of each grant operated by the necessary and proper clause.[9] Thus, as recognized by the District Court, "Congress very likely possess the power to regulate the construction of . . . highways [constructed without federal funds]," 337 F. Supp. at 226, citing *Wickard v. Filburn*, 317 U.S. 111 (1942). In *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943), the Supreme Court held that, "[v]ehicular roads and bridges are as indispensable to the interstate movement of persons and goods as railroad tracks and bridges are to interstate transportation by rail. If they are used by persons and goods passing between the various States, they are instrumentalities of interstate commerce." 318 U.S. at 129. Since the Route 238 Project would connect two interstate highways, it is immaterial

6. U.S. Const. Art. I, § 8, Cl. 3.
7. U.S. Const. Art. I, § 8, Cl. 7.
8. U.S. Const. Art. I, § 8, Cl. 1.
9. U.S. Const. Art. I, § 8, Cl. 18.

whether it is to be financed with federal funds insofar as the federal power to regulate is concerned. As the Supreme Court stated in *Norfolk & Western R.R. Co. v. Pennsylvania*, 136 U.S. 114 (1890), "a link in a through line of road" involved in interstate commerce is for that reason subject to federal regulation. 136 U.S. at 118-119. Thus the federal courts have not hesitated to hold under the Commerce Clause that various state highway activities are subject to federal law even where such activities are not federally financed or involve local highways merely connected to an interstate route.[10] See, *e.g.*, *Walling v. McCrady Const. Co.*, 60 F. Supp. 243 (W.D. Pa. 1945), *aff'd*, 156 F.2d 932 (3d Cir. 1946, *cert. denied*, 329 U.S. 785; *Tobin v. Alstate Const. Co.*, 195 F.2d 577 (3d Cir. 1952).

Since the federal government clearly has the power to regulate activities on the Route 238 Project irrespective of contract, the manner in which the power is exercised, and more particularly the time at which it is exercised, can not tenably be made to rely on the existence of a grant-in-aid contract. Those determinations must rather be made by examining the language of the statutes in light of the congressional purpose, the entire regulatory scheme and administrative process, and practical considerations—matters dealt with earlier in this memorandum.

2. THE STATE WOULD BE BOUND EVEN IF GRANT-IN-AID CONTRACTUAL CONSIDERATIONS WERE RELEVANT SINCE THE STATE HAS ALREADY ENJOYED THE BENEFITS OF FEDERAL INVOLVEMENT.

Throughout this litigation petitioners have taken the position that they are not now bound by duties arising

10. It is conceded that the Route 238 Project is not merely a link in the interstate system, but has been officially designated a part of the "federal-aid primary system." (I C.T. 458.) Therefore in this case, unlike those just cited, the Court does not have to look further to find a basis for exercise of federal regulatory power.

under federal law since they have not yet received any federal benefits. Nothing could be further from the truth. As will be seen, the states receive so many federal benefits prior to final approval of any particular project that contractual obligations are constructively created almost at the outset of federal involvement.

In 1967 federally-aided systems covered 9,290 miles of highway in California, and all but 124 miles were state (i.e., not interstate) highways.[11] In 1970, federal-aid highway funds accounted for 56 percent of the total capital expenditures for highways in this State.[12] Indeed, undisputed evidence in this case shows that federal-aid highway funds are necessary and will be sought for the Route 238 Project due to the developing shortage of state highway funds.[13]

Perhaps the single most important benefit the State has already received by establishing and maintaining the eligibility of the Route 238 Project to receive federal funds is flexibility in planning and financing. Pursuant to 23 U.S.C. § 104, apportionments of federal-aid highway funds are calculated in lump sums for each of the categories of federal-aid highways within a state. The FHWA does not decide which of the eligible projects within a state shall actually receive funds or when; this allocation is left to the states. For this reason, and to insure that they receive the maximum funds to which they are entitled, state highway departments normally make more projects eligible for federal funding than could be financed out of apportioned funds available at any single given time. By staggering the

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11. Silen, *Highway Location in California: The Federal Impact*, 21 Hastings L.J. 781, 825 (1970).

12. FHWA, *Highway Statistics—1970*, Table SF—21 (1971).

13. See the affidavits of Joseph C. Houghteling and Alexander Pope (Pls. Exs. 47 and 48), both members of the California Highway Commission at the time the State sought location approval for the Route 238 Project.

work on eligible projects for which federal reimbursement will be sought the states insure that they will always be in a position to rapidly utilize available federal funds.[14] In short, the eligibility for federal funds of the Route 238 Project provides the State an all important option to seek those funds in a manner and at a time that will maximize the total statewide amount actually received. Moreover, and most important, the State enjoys the benefit of this option regardless of whether it actually requests the federal reimbursement the Route 238 Project is eligible to receive.

But this major federal benefit is hardly the only one the State has already received in connection with the Route 238 Project. The Project received "Stage 1 program approval" from the FHWA on November 21, 1968. The function of stage 1 program approval (and the reason such approval was sought) is stated in PPM 21-1 (April 15, 1958). Paragraph 4a(5) of that PPM states as follows:

> Stage 1 program action is intended (a) to permit certain work preliminary to the physical construction of the highway to proceed prior to the availability of Federal funds, (b) to facilitate advancement of the project to Stage 2 when and if Federal funds are provided, and (c) to permit authorization of preliminary engineering or right-of-way which action establishes the date on and after which eligible costs incurred in performance of such work on Stage 1 projects may be reimbursed from available Federal funds, if the work is subsequently approved in a Stage 2 program.

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14. As stated in Peterson & Keenan, *The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretation*, 2 ELR 50001 at 50003-50004 (1972): "This prevailing practice of proposing projects in an incremental, piecemeal fashion enables the states to spend federal-aid highway funds as rapidly as possible. But . . . it poses serious difficulties in implementing federal laws which are intended to mitigate the highways' adverse environmental and social effects."

In other words, without first securing the stage 1 program approval, "work preliminary to the construction of the highway" could not proceed, *even if carried out solely with state funds,* on projects for which federal reimbursement may later be sought. With respect to the Route 238 Project this means that the costs of preliminary engineering, etc., would not be eligible for 50 percent federal reimbursement,[15] as they now are, if the State had not first secured program approval. Furthermore, the benefits of such approval began on the day it was accorded, since, as stated in PPM 21-1, such approval functions" to establish the date on and after which eligible costs . . . may be reimbursed . . . ." (Par. 4a(5)(c).)

As petitioners concede, the Route 238 Project has received not only stage 1 program approval but also location approval. The benefits that flow from location approval are also considerable. Thus, for example, pursuant to paragraph 10e of PPM 20-8, once location approval is granted a state may be authorized to acquire right-of-way before obtaining design approval provided certain criteria are met. Such criteria are set forth, among other places, in IM 20-1-69 (April 8, 1969) and IM 80-2-71 (Nov. 4, 1971). The former provides that "subsequent to the approval of location" full and partial takings of land for right-of-way are permissible (a) where necessary to forestall proposed commercial or residential development on such land, (b) where necessary to effect a "substantial dollar savings in the cost of right-of-way" or (c) where a property owner would suffer "undue hardship" if acquisition is deferred until after design approval.[16] Thus, but for the fact that the

15. Certain preliminary expenses are 100 percent reimbursable. See, e.g., 42 U.S.C. § 4631.

16. See also, PPM 21-1(8) (April 22, 1963), Par. 9(f), which also authorizes federal funding of certain preliminary expenses prior to final project approval.

Route 238 Project had previously received location approval, the State could not have begun the preliminary work on the Project that is now eligible for federal reimbursement.

There are numerous other benefits presently available to the State as a result of the fact that the Route 238 Project has received program and location approval. For example, pursuant to 23 U.S.C. § 108, the State may *now* request advance funds, without interest, for the purpose of making advance acquisitions if it does not possess sufficient State funds. See also, 23 U.S.C. § 124. Similarly, pursuant to 23 U.S.C. § 120(h), the State may *now* request advance federal reimbursement for a portion of the preliminary engineering costs of the project. In short, contrary to petitioners' representations, the State has already received numerous options and other benefits as a result of the fact that it sought and obtained initial federal approvals for the Route 238 Project and had said project designated a part of the federal-aid primary system.

3. IT IS NOW TOO LATE FOR THE STATE TO EXTRICATE ITSELF FROM DUTIES IMPOSED BY FEDERAL LAW EVEN IF IT WERE WILLING TO FOREGO FEDERAL FUNDS.

Considering the benefits they have already received, it is now too late for petitioners to insulate themselves from the mandate of the law even if they were willing to forego federal funds. And at least two courts have so held in cases remarkably similar to that here presented. *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dept.*, 446 F.2d 1013 (5th Cir. 1971), involved a segment of highway on the federal-aid primary system that would pass through a park in San Antonio, Texas. Federal highway officials admitted that they had not complied with the NEPA and Section 4(f) but argued

that the statutes were inapplicable. After rejecting these arguments the court turned to the Texas Highway Department's argument that, regardless of what the court decided about the validity of federal approval, the court had no power to enjoin the project "because the State is determined to build the highway with its own funds, 'if necessary'"[17] 446 F.2d at 1027. However, federal funds are not apportioned to particular projects, but are allocated in block grants to the states under a statutory formula for the states to thereafter apportion to eligible projects; therefore the Texas Highway Department would not really have to make any sacrifice; it could simply give to Peter what was taken from Paul. Indeed, the highway department revealed the transparency of its putative willingness to sacrifice federal funds by arguing as follows (446 F.2d at 1027):

> In all candor, it must be admitted that in the event the Secretary of Transportation or the Courts should rule that federal law prohibits federal participation in the "North Expressway" construction project, other eligible projects will be submitted to take up available federal funding.

Perceiving the disingenuousness of this argument, the court categorically rejected it stating that: "If we were to accept [the State's position], we would be giving approval to the circumvention of an Act of Congress. . . . The State may not subvert [the supremacy of federal law] by a mere change in bookkeeping or by shifting funds from one project to another." 446 F.2d at 1027.

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17. Thus the state defendants in the *San Antonio* case went much further than petitioners in the present case who in their brief in the Ninth Circuit conceded that they "have not officially foresworn all future federal financial participation in the project." (Appellants' Opening Brief in 9th Circuit, p. 29.)

Similarly, in *Sierra Club v. Volpe*, 351 F. Supp. 1002 (N.D. Cal. 1972), the state defendants (who are petitioners in the instant case) waived federal funds after suit was filed in a transparent effort to evade application of federal environmental statutes. This effort was unavailing. As stated by the court:

> Waiver of federal aid by the state, acquiesced in by the federal agency, at the last minute for a project which has otherwise been long treated as a federal aid project, should not be made a ground for disclaiming the federal nature of the project where it appears that the purpose is to avoid compliance with federal statutory environmental requirements.
>
> This is especially true in this case, where, at the time of filing suit and issuance of the temporary restraining order herein, *the project was clearly a "federal project" in that the state defendants still retained their option to apply for federal funding.* 351 F. Supp. at 1007 (emphasis added).

In short, the courts do not need to wait until a federally financed highway project actually receives federal funds; for at that point the highway is a *fait accompli*, the affected public will already have been irreparably harmed, and the courts will be powerless to fashion a meaningful remedy. *Triangle Improvement Council v. Ritchie*, 402 U.S. 497 (1971); *Concerned Citizens for the Preservation of Clarksville v. Volpe*, 445 F.2d 486 (5th Cir. 1971). As stated in Roberts, *Highway Relocation Planning and Early Judicial Review*, 7 Harv. Jour. on Legis., 179, at 206 (Jan. 1970):

> The residents of an area through which a federal-aid highway may be built have been given certain specific rights under the procedures promulgated by the FHWA to enforce the relocation and hearing provisions of the Act. *These rights will only be viable through the time of the first or corridor hearing and*

approval. Consequently, a court should grant review at that time. This should be done despite the fact that there may be further administrative procedures before actual construction is begun. The clear and persuasive threat of harm from withholding judicial review at that point makes it essential that the courts find that in the context of this particular administrative process the agency action is final and that the case is ripe for review. As in most areas of the law, unless a legal right is accompanied by an adequate remedy it will be of no worth. The only method of securing the rights discussed here is to allow judicial review at the time of the initial proceeding (Emphasis added.)

III.

CONCLUSION

The courts below, in incisive and thoughtful opinions, decided this case correctly. Their decision is correct not only because it ascribes to the statutes and regulations the meaning and consequences that were intended by Congress and the federal regulatory agency, but because it was the only possible decision that comports with common-sense.

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,
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